UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Carbon Injection Systems LLC,	)	**Docket No. RCRA-05-2011-0009**
Scott Forster,	)	
and Eric Lofquist,	)	
	)	
Respondents.	)	

ORDER ON RESPONDENTS' OMNIBUS MOTION IN LIMINE ON "ROUTINE" MATTERS

The hearing in this matter is scheduled to commence on June 18, 2012. On May 4, 2012, Respondents filed an Omnibus Motion *in Limine* on "Routine" Matters ("Motion" or "Mot."). On May 17, 2012, Complainant filed its Response to Respondents' Omnibus Motion *in Limine* on "Routine" Matters ("Response" or "Resp."). In their Motion, Respondents set forth ten (10) general categories of evidence "expected to be offered by U.S. EPA" and request an affirmative ruling that any evidence falling within such categories be excluded from the record. Mot. at 1.

The ten categories of evidence Respondents seek to have excluded are:

1. U.S. EPA should be precluded from introducing any documents, exhibits, or witness testimony that have not been included or identified in U.S. EPA's Prehearing Exchange (as supplemented or amended).
2. U.S. EPA should be precluded from introducing opinion testimony from anyone not previously identified and disclosed as an expert.
3. U.S. EPA should be precluded from introducing evidence regarding the activities of the Respondents after the relevant events in this case.
4. U.S. EPA should be precluded from introducing any speculation or argument about the substance of the testimony of any witness who is absent or unavailable, or whom Respondents did not call to testify.
5. Any reference to Respondents' refusal to agree or stipulate to any matter should be excluded.
6. The Court should preclude any reference to the receipt by Respondents, or their entitlement to receive, benefits of any kind from a collateral source such as insurance coverage.
7. Any evidence of settlement negotiations between the parties should be excluded.
8. Non-party fact and expert witnesses, excepting a party's designated representative, should be excluded during the hearing (except when testifying).
9. Non-party witnesses should be represented by counsel, if desired.

10. The identification and expected sequence of witnesses and exhibits should be provided by each party prior to hearing.

Mot. at physical page 5.

In its Response, Complainant sets forth the following general positions with respect to each of the ten categories:

1. Complainant notes that both parties are equally bound by the Rules of Practice in submitting additional evidence and, to that extent, does not dispute the principles expressed therein. Resp. at 2-3 (citing 40 C.F.R. § 22.19(a)(1)).
2. Complainant agrees that both parties are limited by the same principles that govern the admission of opinion testimony. However, Complainant notes that lay witnesses may properly present opinion testimony in certain circumstances and that EPA penalty witnesses are treated as expert witnesses for the purposes of admitting testimony regarding how the proposed penalty was calculated. Resp. at 3-4 (citing cases).
3. Complainant argues that the chronological limits of relevance have not yet been established in this case and that decisions regarding relevance should be determined at hearing in the context of a particular proffer of evidence. Resp. at 4-5.
4. Complainant notes that Respondents have not identified specific evidence or testimony in this category and refer to the general rule for the admissibility of evidence that applies equally to both parties. Resp. at 5 (citing 40 C.F.R. § 22.22).
5. Complainant agrees that evidence regarding Respondents' refusal to agree to or stipulate to any specific fact or document is irrelevant, and therefore inadmissible. Resp. at 5.
6. Complainant concedes that evidence of insurance cannot be used to prove liability, but argue that such evidence may be admitted for another purpose (e.g., to show proof of agency, ownership, or control, or bias or prejudice of a witness). Resp. at 6 (citing Fed. R. Evid. 411).
7. Complainant agrees that evidence relating to settlement negotiations must be excluded from hearing. Resp. at 6.
8. Complainant agrees that fact witnesses (except party representatives) should be excluded from the court room when not testifying, but argues that expert witnesses should not be sequestered as their testimony is based, in part, on the testimony of other fact and expert witnesses. Resp. at 6-7.
9. Complainant agrees that counsel for a non-party witness may be present in the courtroom while the non-party witness is testifying, but requests that counsel be prevented from participating in the proceedings. Resp. at 7.
10. Complainant argues that the Rules of Practice create no requirement to share with opposing parties the expected sequence of witnesses or documents at hearing. However, Complainant argues that if such request is granted, that four specific conditions be attached. Resp. at 7-8.

A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from

being introduced at hearing on the basis that it lacks relevancy and probative value. "[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* at 1400-01. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion *in limine* means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

Initially, I note that Respondents' requests are not appropriate for a motion in *limine*, not appropriate at this stage in this particular matter, or unnecessary. With respect to categories 1, 2, 4, and 6, the parties are reminded that this proceeding is governed by the Rules of Practice (40 C.F.R. part 22) and no specific order is necessary to implement those rules in this proceeding. In addition, where the Rules of Practice are silent or ambiguous, this Tribunal will generally follow the Federal Rules of Evidence ("FRE"), and no advisory opinion will issue for a general category of potential evidence identified in the Motion for which the FRE and federal case law provide specific guidance.

With respect to categories 8 and 10, the parties have already agreed to sequester fact witnesses and the exclusion of expert witnesses has already been addressed during the prehearing conference call. The parties remain free to negotiate an agreement on the order of witnesses and documents, but this Order will not mandate the parameters of such an agreement. With respect to categories 5, 7, and 9 (with the condition that non-party counsel does not participate in the proceedings), the parties are in agreement and will be deemed to have stipulated to these issues at hearing.

With respect to category 3, it is premature to decide the chronological limits of relevance particularly where Respondents have not specifically identified any evidence or testimony in their Motion. Nevertheless, the parties are reminded that all necessary allegations must be properly pled in the operative Complaint and facts arising after the period of alleged violation are generally not relevant as to liability. Accordingly, the Motion is **DENIED**.

SO ORDERED.

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Susan L. Biro
Chief Administrative Law Judge

Dated: May 30, 2012
Washington, D.C.